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**SUPREME COURT OF THE UNITED STATES**

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**OCTOBER TERM, 1978**

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**NO. 77-1439**

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**WILLIAM RILEY HUGHES**  
**Appellant**

**vs.**

**THE STATE OF OKLAHOMA**  
**Appellee**

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**ON APPEAL FROM THE COURT OF CRIMINAL  
APPEALS OF THE STATE OF OKLAHOMA**

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**BRIEF OF APPELLANT**

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### OPINION BELOW

The opinion and judgment of The Court of Criminal Appeal of the State of Oklahoma is officially reported in 572 P.2d 573. It is reprinted and appears as Appendix A, (p. A-1), to the Jurisdictional Statement.

## GROUNDS OF JURISDICTION OF SUPREME COURT

This Court has jurisdiction to review the order denying rehearing of the judgment and sentence of the Court of Criminal Appeals of Oklahoma under 28 USC § 1257 (2). Pursuant to Title 29 Okla. Stat. § 4-115B, appellant was convicted of unlawfully transporting minnows for sale outside of the State of Oklahoma which were seined or procured within the waters of Oklahoma. For this misdemeanor grade offense, appellant was fined \$200.00 and costs.

In the Court below, which was the highest court of the State in which a decision could be had, there was drawn in the question the validity of 20 Okla. Stat. § 4-115B on the grounds of its being repugnant to the interstate commerce clause, Art. I, § 8, cl. 3, Constitution of the United States, and the decision was in favor of its validity.

The case of *Charleston Federal Sav. & Loan Asso. v. Alderson*, (1945) 324 US 162, 65 S Ct 624, 89 L Ed 857, reh den 324 US 888, 65 S Ct 863, 89 L Ed 1436 (see the last paragraph, 324 US at 185, 65 S Ct at 627, and authorities there collected and cited), is relied upon to sustain this Court's jurisdiction.

Extracts from the opinion below which sustain this Court's jurisdiction under the rule of *Alderson*, supra, are:

"Defendant's sole assignment of error is that 29 O.S.Supp. 1974, § 4-115B violates the interstate commerce clause of the Constitution of the United States which confers upon the Congress of the United States exclusive power

to regulate interstate commerce." Slip opinion, p. 2 Appendix A, (p. A-2), Jurisdictional Statement.

"... No Person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause and the defendant's assignment of error is without merit. The judgment and sentence appealed from is, accordingly, **AFFIRMED**." Slip opinion, p. 4, Appendix A, (p. A-5), Jurisdictional Statement.

The time factors upon which jurisdiction rest are as follows: The opinion and judgment of affirmance was entered on December 6, 1977. (Appendix p. 1; Appendix A, (p. A-5), Jurisdictional Statement.) The order denying rehearing was entered on January 7, 1978. (Appendix p. 1; Appendix B, (p. A-6), Jurisdictional Statement.) The notice of appeal was filed on January 12, 1978. (Appendix p. 1; Appendix C, (p. A-11), Jurisdictional Statement.) The Clerk of the Court below mailed the record to the Clerk of this Court on March 31, 1978. (Appendix p. 1.) The Jurisdictional Statement was filed and the appeal was docketed in this Court on April 7, 1978. The order of this Court noting probable jurisdiction was entered on October 2, 1978. (Appendix, p.2.)

## CONSTITUTIONAL PROVISION AND STATUTES WHICH THE CASE INVOLVES

The commerce clause, (Art. I § 8, cl. 3), to the Constitution of the United States provides as follows:

"The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."



The Oklahoma Wildlife Conservation Code is found in Okla. Laws of 1974, c 17; Title 29 O.S.Supp., 1974, as amended; Title 29 O.S.A. §§ 1-101 et seq. The provisions that are involved are as follows:

“ § 2-103 Buy “Buy” is to obtain an item by an exchange for consideration, and includes barter, offer to buy or the act of buying.”

“§ 2-109 Endangered “Endangered” refers to any wildlife species or subspecies whose prospects of survival and reproduction are in immediate jeopardy as determined by Act of Congress, Oklahoma statute or Commission resolution. The following are considered “endangered”: American peregrine falcon, blackfooted ferret, Indiana bat, red wolf, southern bald eagle and whooping crane.”

“§ 2-110 Fishing “Fishing” is defined as the taking or attempting to take fish or other aquatic dwelling organisms by hook and line, seine, trap or such other means as may be designated as legal by the provisions of this Code or by the Oklahoma Wildlife Conservation Commission.”

“§ 2-113 Game “Game,” when used alone, refers to mammals and birds and does not include fish.”

“§ 2-115 Game fish “Game fish” is a fish normally sought after by sportsmen, and includes only largemouth bass, smallmouth bass, spotted bass, black crappie, white crappie, northern pike, trout, striped bass, walleye, blue

catfish and channel catfish. Blue catfish and channel catfish are herein defined to mean “forked tail” catfish.”

“§ 2-121 Minnows “Minnows” are small nongame fish commonly used for bait and include bluntnose, bullhead minnows, chubs, dace, darters, fatheads, killfish, small carp, small goldfish, shiners and stonerollers.”

“§ 2-123 Nongame fish “Nongame fish” are all fish not game fish.”

“§ 2-133 Protected wildlife “Protected wildlife” is all wildlife which is accorded some measure of protection in the time or manner of taking other than restriction in the use of artificial lights or poison.”

“§ 2-135 Rare “Rare” refers to wildlife species or subspecies that, although not presently threatened with extinction, are in such small numbers through their range that they may be endangered if their environment deteriorates. Such species may be declared “rare” by Act of Congress, Oklahoma statutes or Commission resolution. The following are specifically considered “rare” in Oklahoma: greater sandhill crane, lesser prairie chicken, northern greater prairie chicken, spotted bat and western burrowing owl.”

“§ 2-143 Transport “Transport” is the carrying or moving by any means, causing to be carried or moved by any means, or accepting and receiving wildlife for such carrying or movement.”

"§ 2-149 Wildlife "Wildlife" is all wild birds, mammals, fish, reptiles, amphibians and other wild aquatic forms and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive, and shall extend to and include any and every part of any individual species of wildlife."

§ 4-115 Minnow dealer's interstate license. This section is found reprinted in Appendix D, (p. A-12), Jurisdictional Statement.

§ 4-116 Minnow dealer's intrastate license (source within state, except as otherwise provided). This section is found reprinted in Appendix D, (p. A-13), Jurisdictional Statement.

"§ 7-204 Ownership of wildlife All wildlife found in this state is the property of this state."

### QUESTION PRESENTED

Is subsection B of section 4-115 of 29 O.S.Supp., 1974 repugnant to Art. I, § 8, cl. 3, United State Constitution?

### STATEMENT OF THE CASE

The facts were all stipulated. The opinion below fairly and correctly states them. It will be quoted:

"The defendant for thirty years prior to the date of the offense in question was licensed under the law of the State of Texas as a minnow dealer; the defendant had a regular com-

mercial minnow business located in Archer County, Texas, approximately two miles south of Wichita Falls, Texas; he had been engaged in such business for one year before the date of the offense in question; on the day in question he purchased a load of minnow[s] from Fred Schokey, a minnow dealer licensed under the laws of the State of Oklahoma, at Mr. Schokey's place of business at Purcell, Oklahoma; defendant was [i]n route to his place of business at Wichita Falls, Texas, transporting the load of minnows in his vehicle, when he was detained and arrested in Waurika, Jefferson County, Oklahoma; the wholesale value and cost price of the minnows was \$350.00, and the defendant was detained and arrested by Hackell Bershere, an Oklahoma licensed Game Ranger, without a warrant. The amended information further reflects that the date of the purchase was on or about April 23, 1976." Appendix A, (p. A-2), Jurisdictional Statement.

### ARGUMENT

This appeal presents, on the one hand, the right of inhabitants of the United States to engage in interstate commerce with citizens of Oklahoma and the right, on the other hand, of Oklahoma to utilize her police power to prevent it, where the subject of the commerce is minnows taken from the waters of Oklahoma.

It is very important to observe that the subject of the commerce in question is a natural resource of Oklahoma. The specific resource is minnows. It will become patent from the record that they are not shown to be depleted or endangered.

Upon authority of Title 29 O.S. Supp., 1974, § 4-115B, Oklahoma intercepted, by means of arrest, and prevented the appellant from transporting and shipping to his market point and place of business in Texas, minnows that he purchased in Oklahoma from a locally licensed minnow dealer. To date, Oklahoma has successfully prevented interstate commercialism in these minnows by national citizens upon authority of § 4-115B of its Wildlife Conservation Code of 1974, which is Title 29 of its general statutes.

Section 4-115B provides the following:

"No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows:
2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

#### APPELLANT'S CONTENTIONS

Appellant, who engages in the minnow business in Texas, contends, both on its face and in its plain effect, that § 4-115B constitutes an impermissible discrimination against appellant's right, secured to him by the commerce clause of the United State Constitution, to buy minnows in Oklahoma from licensed dealers therein who took them from her waters, including the right to transport them to Texas to his market point. Further, appellant contends that there is nothing about the nature of the minnows as a

natural resource and their Oklahoma origin that prevents them from being privately owned articles of trade and commerce when they are purchased in Oklahoma from a licensed dealer.

#### SUMMARY OF POINTS OF ARGUMENT IN SUPPORT OF APPELLANT'S CONTENTIONS

I. Oklahoma's general police power to enact § 4-115B was never lawfully invoked.

A. Though the general police power exists, facts are neither facially shown to exist in the Oklahoma conservation code nor shown by the stipulated facts which would have authorized the use of such power to enact § 4-115B.

B. In the alternative, if the use of the general police power was authorized, in using it a policy of economic protectionism was created by the use of export discrimination in the passage of § 4-115B which annulled the valid use of the general power.

II. Oklahoma derived no power to enact § 4-115B solely from the state ownership doctrine of *Greer V. Connecticut*, (1896) 161 US 519, 16 S CT 600, 40 L Ed 793. That power and its doctrine is no longer viable when it is sought to be used to limit the right of a national citizen under the interstate commerce clause.

#### I

In holding that § 4-115B was constitutional, Oklahoma's Highest Court found that the object or purpose of the law was different than the object or purpose of the law in the *Haydel* case, (278 US1, 49 S Ct1, 73 L Ed



147, (1928). It held that the "primary purpose of § 4-115B is to reduce depletion of natural minnows." "[T]he law served to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation." Slip opinion, Appendix A, (pages A-3 and A-4), Jurisdictional Statement.

"One challenging the validity of a state enactment on the grounds that it is repugnant to the commerce clause is not necessarily bound by the legislative declaration of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce." *Haydel* case, 287 US at 10, 49 S Ct at 3. The opinion of the highest court of a state is "not free from constitutional scrutiny" by this Court. *City of Philadelphia v. New Jersey*, 1978, 98 S Ct at 2535.

Since the Oklahoma Wildlife Conservation Code is barren of any specific fact finding that her minnows are depleted or are in danger of being depleted, and, since no specific provisions exist therein from which such finding could be inferred, (for example, 'catch' limit or requirement that the use be confined to Oklahoma), the protection-against-depletion-through-commercial-exportation finding of Oklahoma's Highest Court is a "specious reason". *Douglas v. Seacoast Products, Inc.*, 1977, 97 S Ct at 1752, footnote 21. In misconceiving the law's purpose or object, and thereby failing to observe the policy of economic protectionism by the use of an export discrimination that it created, Oklahoma's Highest Court fell into error when it distinguished the *Haydel* case.

## II

Section 4-116A authorized Mr. Fred Schokey, (an authorized minnow dealer), to seine, without a catch limit, natural minnows from Oklahoma's water. Thereunder, he

is required to sell them in Oklahoma. Thereunder, the dealer's buyer, (the appellant), can buy minnows in Oklahoma in unlimited numbers; is unlimited in his right to sell or use them; and is unlimited as to the place where such rights can be exercised. By definition, (§ 2-121), all minnows--whether natural or hatchery in origin--are "bait", not human food.

Without question, since minnows are a natural resource of the state, police power exists which would have authorized Oklahoma to enact laws that would protect the people of that state against the depletion of minnows. But the law must have as its purpose that very objective. Oklahoma cannot use her police power authority as a pretext or guise in order to achieve a purpose in a law that in truth and in fact the people of that state have no public interest in, but, on the other hand is vital to the national citizen.

When § 4-115B is viewed in the light of § 4-116A and § 2-121 and the Wildlife Conservation Code as a whole, it is patent that the object and purpose of § 4-115B was to create a policy of economic protectionism by the use of an export discrimination. Minnow hatchery owners may sell in the export market. Natural minnow dealers are *indirectly* deprived of that right. National citizens are also *directly* deprived of that right.

The Oklahoma Wildlife Conservation Code reflects no police power purpose with respect to natural minnows. No depletion of minnows is shown to exist and no conservation of them is shown to be needed. No 'catch' limit section exists. The buyer's *use rights* are unrestricted. Minnows are shown therein to be fish bait, not human food. They are not shown by the law to be dangerous to mankind. Human morals are not involved. Section 4-115B



does not direct itself to the general welfare of the people. Section 4-115B is directed to a policy of economic protectionism by the use of an export discrimination involving business. A simple economic protectionism policy is created by state legislation. The hatchery minnow business is preferred to the business detriment of the natural minnow dealers and the national citizens. One may successfully engage in interstate commerce while the other cannot. The inequality is achieved indirectly by regulating transportation. The purchasing power of the export buyers of natural minnows is, by law, limited to three dozen minnows. Yet the purchasing power of the export buyers of hatchery minnows is unlimited. In short, Oklahoma's law places an embargo on natural minnows for a business reason, which serves only those business men involved and does not serve the people of Oklahoma.

"The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. [Citations omitted.] The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 1978, 98 S Ct at 2535.

Interstate commerce begins with a purchase. "... [W]here goods are purchased in one state for transportation to another, the com-

merce includes the purchase quite as much as it does the transportation. . . . This has been recognized in many decisions construing the commerce clause. . . . Buying and selling and the transportation incidental thereto constitute commerce. . . . In no case has the court made any distinction between buying and selling or between buying for transportation to another state or transporting for sale in another state. Quite to the contrary, the import of the decisions has been that, if the transportation was incidental to buying or selling, it was not material whether it came first or last." Per Mr. Justice VAN DEVANTER, in *Dahnke-Walker Milling Co. v. Bondurant*, 1921, 257 US at 290-291, 42 S Ct at 108.

The rationale of the *Haydel* case, *supra*, was the condemnation of a policy of economic protectionism created by an export discrimination. No justifiable state interest could be found to exist in a law which prohibited the exportation of shrimp with heads and hulls *unremoved* but permitted it with them *removed*. If *all* shrimp had been ordained to not be exported the law would have been founded in a justifiable state interest.

By a parity of reason, if *all* minnows had been ordained to not be exported, the Oklahoma law would have been founded in a justifiable state interest. Since minnows are not a human food, but only a "bait" for other fish, a greater scrutiny is demanded. When properly scrutinized, for lack of a specific finding of "bait" depletion; for lack of a 'catch' limit and lack of restriction upon *use* in the hands of the buyer, from which a finding can be inferred that natural minnows are depleted or endangered, the export discrimination lacks a justifiable state interest and

becomes a policy of economic protectionism. *Haydel*, supra and *City of Philadelphia*, supra, are ample authority to condemn this Oklahoma law.

In § 4-115B, "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." *City of Philadelphia v. New Jersey*, 98 S Ct at 2537. "[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Id.* Under § 4-116A, appellant was not required to use the minnows in Oklahoma. Being free to use them at Wichita Falls, Texas, the minnows became appellant's unimpaired private property and articles of trade and commerce at Purcell, Oklahoma. "[A] State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State. *Foster Packing Co. v. Haydel*, supra, 278 U.S. at 10, S. Ct. at 4." *Id.*

In the context of minnows as a general class-- "when a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it." *H.P. Hood & Sons v. Du Mond*, 1949, 366 US at 535, 69 S Ct at 663.

The conclusion required to be reached is that § 4-115B is patently barren of any fact or facts which exhibit a state interest designed to promote and protect her interest in conservation, health, food, safety, morals, or general welfare of her people. The section is an export discrimination and becomes a policy of economic protectionism. It is

unconstitutional and void. Appellant's conviction rests upon a void law and must be reversed.

### III

Oklahoma derived no power to enact § 4-115B solely from the state ownership doctrine of *Greer v. Connecticut*, supra. That power and its doctrine is no longer viable when it is sought to be used to limit the right of a national citizen under the interstate commerce clause. The doctrine was first questioned in *Missouri v. Holland*, 252 US 416, 434, 40 S Ct 382, 284, 64 L Ed 641 (1920). It was next questioned in *Toomer v. Witsell*, 334 US 285, 402, 68 S Ct 1156, 1165, 92 L Ed 1460 (1948). In 1977, it was questioned in *Douglas v. Seacoast Products, Inc.*, 97 S Ct 1740, 1751. This year it was explained and held still viable when subjected to an attack based upon privileges and immunities and equal protection. However, when subjected to a commerce clause attack, it is said to be no longer the law. See the majority opinion in *Baldwin v. Fish & Game Com'n of Mont.*, 98 S Ct 1852, 1861, and the concurring opinion at 98 S Ct 1864-1865. As Mr. Chief Justice BURGER pointed out the state's authority to regulate its wildlife is to be found in the "State's special interest in regulating and preserving wildlife for the benefit of its citizens." But, it cannot do so invidiously or speciously. It may do so if and only if the true State's interest is achieved.

### CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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